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BOOK REVIEW

The Dawn's Early Light: The Contributions of John Hart Ely to Constitutional Theory†

DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW.

By John Hart Ely. Cambridge: Harvard University Press, 1980. Pp. ix, 261. \$15.00.

STANLEY CONRAD FICKLE*

Professor John Hart Ely has been, in my judgment, the single most creative scholar writing in the area of constitutional law during the last decade. Consequently, when his first book hit the market,¹ I eagerly grabbed the first copy I could locate. It is fair although somewhat understated to describe my reaction on reading *Democracy and Distrust*² as one of progressive disappointment.

It's not that there is any question that the book is an event of major significance in the development of American constitutional theory; no book bringing together so much of Ely's thought could be anything less. Moreover, *Democracy and Distrust* is short enough to be widely read, Ely's engaging style ensures that few who pick it up will fail to read it through, and his head-on confrontation with so many of the truly difficult issues of constitutional theory will make ignoring it a pretty risky business for anyone working in the area, bench and bar included. Even Ely's lengthy textual footnotes retain their luster, although they are now buried in the back of the book. It's just that an appetite whetted by ten years of Ely's writing was not about to be satisfied by this shortened and somewhat reorganized version of the material he had previously published.³ Most

† Cf. F. KEY, *THE STAR-SPANGLED BANNER* (1814).

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¹ That there would be a book was, to my knowledge, first publicly announced in Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399, n. † (1978).

² J. ELY, *DEMOCRACY AND DISTRUST* (1980).

³ Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973);

disappointing of all, Ely's treatment of the subject that had been publicly reserved for the book⁴—a general theory explaining which governmental actions ought to be subjected to strict scrutiny under the equal protection clause—seemed to be at best incomplete and, at worst, unconvincing.

I have sometimes wondered whether book reviews in the law journals serve any useful purpose; rereading *Democracy and Distrust* for purposes of this review has taught me that they may at least serve to educate the reviewer. Although my overall assessment of the book did not change that much, Ely's work is so full of subtle argument and nuance that I had not nearly exhausted it the first time through. In addition, studying the book reinforced my pre-existing view that Ely is moving constitutional theory in just the right direction.

I

The ambitious task Ely sets for himself, as indicated in the book's subtitle, is to construct "A Theory of Judicial Review." Such a theory must be meaningful in terms of the specific values enumerated in the Constitution's text, consistent with the document's basic commitment to representative democracy, and justifiable in terms of a proper function for the judiciary, that branch of government which is least accountable to the political majority. Establishing those propositions is where the book begins.

Chapter One, entitled "The Allure of Interpretivism," sets the stage by discussing the central dispute in constitutional theory—whether "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the Constitution . . . [or] should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."⁵ Ely assigns the rather ungainly label "interpretivism"⁶ to the former view; the latter is labeled "noninterpretivism." Interpretivism, limiting judicial invalidation of the actions of the politically responsive branches of government to those implicating values textually expressed or fairly inferable from the structure of the Constitution, is most notably identified in the judicial

Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Ely, *Toward A Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155 (1978).

⁴ Ely, *Toward A Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 470 n.69 (1978).

⁵ J. ELY, *supra* note 2, at 1.

⁶ This terminology follows Professor Grey. See Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

philosophy of Justice Hugo Black.⁷ Noninterpretivism, which permits judicial invalidation by reference to values not identified in the text, is most commonly associated with the various forms of substantive due process doctrine as recently exemplified by the Supreme Court's abortion⁸ and contraception⁹ decisions. The major attractions of the interpretivist position—concededly always the dominant strain of constitutional law—are twofold: "The first is that it better fits our usual conceptions of what law is and the way it works";¹⁰ the second is that it is more responsive to the central dilemma of any form of judicial review—reconciling judicial veto of the actions of the elected representatives of the people with "the underlying democratic theory of our government."¹¹ The allure of interpretivism is that when confronted with the charge, "Where do judges get off telling the political majority under a democratic government it can't do what it wants?" the interpretivist can point to the text and reply, "See there—the same Constitution that erects that largely democratic system also specifies certain respects in which the majority may not have its way."

In Chapter Two entitled "The Impossibility of a Clause-Bound¹² Interpretivism," Ely argues that the interpretivist's difficulty arises from the Constitution's open-textured provisions "whose invitation to look beyond their four corners—whose invitation, if you will, to become at least to that extent a noninterpretivist—cannot be construed away."¹³ Significantly, he rejects the view that the traditional vehicle for injecting nontextual values into constitutional law—the due process clause of the fourteenth amendment—was meant to have or should be treated as having substantive content. For Ely, "the most important datum bearing on what was intended is the constitutional language itself."¹⁴ On its face, the due process clause seems clearly and directly to command that the government employ fair procedures when going about the business of depriving a particular person of his or her life, liberty or property. The language does not, on the other hand, appear to call for evaluation of the substantive

⁷ With Justice Black's civil libertarianism as the main referent, Ely argues that there is very little if any correlation between the "interpretivism" and "noninterpretivism" camps on the one hand and popular notions of judicial "activism" and "restraint" on the other. J. ELY, *supra* note 2, at 1-2 & n.*.

⁸ *E.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); Roe v. Wade, 410 U.S. 113 (1973).

⁹ *E.g.*, Cary v. Population Servs. Int'l, 431 U.S. 678 (1977). See also Eisenstadt v. Baird, 405 U.S. 438 (1972).

¹⁰ J. ELY, *supra* note 2, at 3.

¹¹ *Id.* at 4-5.

¹² The hedge is apparently inserted because Ely never ultimately decides whether his theory of judicial review—centered upon the use of the Constitution's "open-ended" provisions as well as others such as the first amendment to the end of maintaining the integrity of the Constitution's system of representative democracy—is interpretivism or rather something between interpretivism and noninterpretivism. As he indicates, nothing much seems to turn on the characterization. See *id.* at 87-88 & n.*.

¹³ *Id.* at 13.

¹⁴ *Id.* at 16 (emphasis omitted).

policy the government is pursuing. The possibility does exist that, despite the language employed, the framers in fact meant the due process clause to have a more expansive and substantive application, but Ely finds little support for that view in the history of the fourteenth amendment—certainly nothing amounting to the very strong showing he would require to override the clear import of the constitutional language.¹⁵

¹⁵ This does not lead Ely to a constricted conception of judicial review in enforcing the due process clause—as, for example, by limiting its application to judicial insistence on procedures provided by statute or those “settled usages and modes of proceeding existing in the common and statute [*sic*] law of England . . . which are shown not to have been unsuited to [the] civil and political condition . . . of this country.” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856). Ely clearly contemplates an active judicial role in assessing the fairness of the government’s behavior when it is engaged in activity that directly results in inflicting serious harm upon specific individuals; the point is that the constitutional language directs judicial attention to issues concerning the procedures the government is using, not the permissibility of the substantive policy it is enforcing.

I do have difficulty with Ely’s brief discussion of procedural due process doctrine as it has evolved during the Burger Court years. He suggests that “[u]ntil recently, the general outlines of the law of procedural due process were pretty clear and uncontroversial,” that the Burger Court has mangled the doctrine so badly that a conceptual “disaster” has ensued, and that part of the Court’s difficulty may stem from its revival of substantive due process. J. ELY, *supra* note 2, at 19-20. While one can agree that the Burger Court’s evolution of procedural due process doctrine—particularly its treatment of precedent and its analytical tools for assessing the content of “life, liberty or property” as set out in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), and evolved through decisions such as *Paul v. Davis*, 424 U.S. 693 (1976), and *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979)—is a conceptual disaster, older cases such as *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), and *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886 (1961), refute the contention that the prior law was “clear and uncontroversial.” Furthermore, the Burger Court’s rather incredible assertion that the content of “life, liberty or property” is *more* expansive for purposes of substantive due process than for procedural due process, *Paul v. Davis*, 424 U.S. 693, 710 n.5, 713 (1976), seems to rebut any inference that the revival of substantive due process is the root of the procedural due process malady.

In general, I think the Court’s current difficulties are those that may be anticipated as government and the society it governs evolve and constitutional values begin to be applied to new sorts of governmental behavior—in the recent procedural due process cases, for example, to governmental entitlement programs, *e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970), public employment in cases not implicating any other constitutional value such as the first amendment, *e.g.*, *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972), and governmental participation in new types of private disputes, *e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971). Such circumstances present conceptual difficulties that neither the Warren Court nor any court before it ever really confronted. In addition, in the procedural due process area in particular, the Court is struggling with considerations of federalism and the legacy of *Monroe v. Pape*, 365 U.S. 167 (1961), and related Warren Court decisions, which construed 42 U.S.C. § 1983 (1976) to require neither exhaustion of state remedies nor state authorization of the conduct complained of in order to state a cause of action. However sound that conclusion might be on the facts of *Monroe*, quite different considerations may obtain where the complaint is simply want of procedural due process unaccompanied by elements of any other constitutional violation. Unfortunately, the Court has been unable to keep straight any distinction between the constitutional issue *per se* and administering § 1983 as a statute. See, *e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 700 (1977) (Stevens, J., dissenting); *Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1, 28-30 (1978) (Stevens, J., dissenting). In the

The privileges or immunities clause of the fourteenth amendment is, however, quite a different matter. Noting the open-ended language, rejecting the received reading of the *Slaughter-House Cases*,¹⁶ which renders the clause meaningless,¹⁷ and checking the facial import of the text against legislative history illuminating the intent of the framers, Ely concludes that "the most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decisionmakers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding."¹⁸ In so concluding, he disagrees with Justice Black's "incorporation" thesis that the privileges or immunities clause, or the due process clause, or the fourteenth amendment "as a whole" were specifically intended to apply the Bill of Rights against the states.¹⁹ On the other hand, Ely concludes, neither the language of the clause nor historical evidence bearing on the intent of the framers precludes later constitutional interpreters from arriving at that result. Just as importantly, there is nothing in the language of the clause to support Justice Black's simultaneous contention that those privileges or immunities either are or should be *limited* to the guarantees enumerated in the first eight amendments, and the historical evidence is to the contrary. In sum, Ely agrees with Bickel that "there was . . . 'an awareness on the part of these framers that it was a *constitution* they were writing, which led to a choice of language capable of growth.'"²⁰ Employing the

related context of the equitable restraint doctrine, compare *Moore v. Sims*, 442 U.S. 415 (1979), with *id.* at 435 (Stevens, J., dissenting); *Trainor v. Hernandez*, 431 U.S. 434 (1977), with *id.* at 460 (Stevens, J., dissenting); *Juidice v. Vail*, 430 U.S. 327 (1977), with *id.* at 339 (Stevens, J., concurring).

¹⁶ 83 U.S. (16 Wall.) 36 (1873).

¹⁷ Ely presents a fascinating reinterpretation of that decision. J. ELY, *supra* note 2, at 196 n.59.

¹⁸ *Id.* at 28.

¹⁹ *Duncan v. Louisiana*, 391 U.S. 145, 163 (1968) (Black, J., concurring); *Adamson v. California*, 332 U.S. 46, 71 (1947) (Black, J., dissenting).

²⁰ J. ELY, *supra* note 2, at 30 (quoting Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63 (1955)). Ely, however, draws this conclusion regarding the intentions of the framers of the fourteenth amendment over a far broader area than Bickel, who was addressing the decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

A collateral but quite important contribution of the book is Ely's discussion of the history of the fourteenth amendment (spread throughout Chapter Two of the book and several textual footnotes). Ely's work is a timely and effective rebuttal of the recently revived assault on the Warren Court based largely on historical materials pertaining to the drafting and modification of the fourteenth amendment. See R. BERGER, *GOVERNMENT BY JUDICIARY* (1977). For an overall view of that part of the debate premised upon in-depth treatment of those historical materials, see J. ELY, *supra* note 2, at ch. 2; BERGER, *supra*; Bickel, *supra*; Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

same methodology—though relying even more heavily on the necessary import of the constitutional language as compared to the use of historical materials—Ely draws similar conclusions with respect to the equal protection clause of the fourteenth amendment and the ninth amendment.²¹

Here then, concludes Ely, is the interpretivist's, at least the "clause-bound" interpretivist's, difficulty. Such constitutional provisions command injection of extratextual content and the interpretivist—the essential premise of whose theory of constitutional adjudication demands faithfulness to textual language—cannot, at least without further effort, responsibly ignore the mandate.²² That further effort, however, must result in a mode of judicial review both principled in application and consistent with the Constitution's central promise of democracy; failing that, perhaps the courts should simply stay away from these open-ended provisions.²³

Ely then turns, in Chapter Three entitled "Discovering Fundamental Values," to consideration of various alternative theories of judicial review collectively labeled interpretivism's "traditional competitor."²⁴ While the methodology varies, these theories have a common theme—that judges should identify and protect particular substantive values that are somehow determined to be truly important or "fundamental." Ely considers approaches urging appeal to the judge's own sense of basic values, employing principles derived from natural law or moral philosophy, and making reference to "neutral principles," "tradition" and "consensus," and in what is probably the single most persuasive part of the book, he devastates them all.²⁵ While the criticism varies, the most crucial point is that "fundamental value" theories lend themselves to elitist manipulation²⁶ and are inherently inconsistent with the Constitution's most "fundamental value"—democracy. Whatever the judiciary's proper role, Ely concludes,

²¹ The fourteenth amendment confers federal rights as against state governments, whereas the ninth applies against government at the federal level. Ely's subject is not federalism, however, and he does not undertake to explore possible differences in application of his approach to the Constitution's open-ended provisions in terms of the particular provision invoked and the level of government to which it applies. *See* text accompanying notes 119-34 *infra*.

²² J. ELY, *supra* note 2, at 38.

²³ *Id.* at 41.

²⁴ *Id.* at 43.

²⁵ Of course, in this field most of all, criticism is easier than formulation. Perhaps for this reason, Ely's critique of the return to substantive due process methodology in *Roe v. Wade*, 410 U.S. 113 (1973), contained in Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973), remains his single most powerful piece of writing.

²⁶ [T]he list of values the Court and the commentators have tended to enshrine as fundamental is a list with which readers of this book will have little trouble identifying: expression, association, education, academic freedom, the privacy of the home, personal autonomy, even the right not to be locked in a stereotypically female sex role and supported by one's husband. But watch most fundamental-rights theorists start edging toward the door when someone mentions, jobs, food, or housing: those are important, sure, but they aren't *fundamental*.

J. ELY, *supra* note 2, at 59 (footnotes omitted) (emphasis in original).

it is not the ascertainment and enforcement of nontextual substantive values against the political branches.²⁷

In Chapter Four, entitled "Policing the Process of Representation: The Court as Referee," Ely lays the framework of his proposed theory of judicial review. For its essentials, he points directly and perhaps surprisingly to the work of the Warren Court. Notwithstanding that Court's occasional lapses into the rhetoric of "fundamental values," Ely argues:

[T]he constitutional decisions of the Warren Court evidence a deep structure significantly different from the value-oriented approach favored by the academy.

Many of the Warren Court's most controversial decisions concerned criminal procedure or other questions of what judicial or administrative process is due before serious consequences may be visited upon individuals—process-oriented decisions in the most basic sense. But a concern with process in a broader sense—with the process by which the laws that govern society are made—animated its other decisions as well. Its unprecedented activism in the fields of political expression and association obviously fits this broader pattern. . . . That Court was also the first to move into . . . the voter qualification and malapportionment areas. These were certainly interventionist decisions, but the interventionism was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process—which is where such values *are* properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis.

Finally there were the important decisions insisting on equal treatment for society's habitual unequals: notably racial minorities, but also aliens, "illegitimates," and poor people. But rather than announcing that good or value X was so important or fundamental it simply had to be provided or protected, the Court's message here was that insofar as political officials had chosen to provide or protect X for some people (generally people like themselves), they had better make sure that everyone was being similarly accommodated or be prepared to explain pretty convincingly why not. . . . [T]he pursuit of these "participational" goals of broadened access to the processes and bounty of representative government, as opposed to the more traditional and academically popular insistence upon the provision of a series of particular substantive goods or values deemed fundamental, was what marked the work of the Warren Court.²⁸

Ely argues that the Warren Court's constitutional jurisprudence found its origin in the famous *Carolene Products* footnote four.²⁹ The core of

²⁷ Rejoinders to this aspect of Ely's work have appeared in the literature, but in my judgment none lays a glove on him. See, e.g., Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980), and Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1030-54 (1979). See also Cox, Book Review, 94 HARV. L. REV. 700, 713-15 (1981).

²⁸ J. ELY, *supra* note 2, at 73-75 (footnotes omitted).

²⁹ "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the

Chapter Four (which unfortunately does not hang together as an integrated whole), and indeed the remainder of the book (of which the same is true), is summarized in Ely's characterization of that footnote:

The first paragraph is pure interpretivism: it says the Court should enforce the "specific" provisions of the Constitution. We've seen, though, that interpretivism is incomplete: there are provisions in the Constitution that call for more. The second and third paragraphs give us a version of what that more might be. Paragraph two suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open. Paragraph three suggests that the Court should also concern itself with what majorities do to minorities, particularly mentioning laws "directed at" religious, national, and racial minorities and those infected by prejudice against them.³⁰

For Ely, the most essential task is to reconcile the themes of the footnote's second and third paragraphs:

Popular control and egalitarianism are surely both ancient American ideals; indeed, dictionary definitions of "democracy" tend to incorporate both. Frequent conjunction is not the same thing as consistency, however, and at least on the surface a principle of popular control suggests an ability on the part of a majority simply to outvote a minority and thus deprive its members of goods they desire.³¹

In order to reconcile these seemingly inconsistent themes, Ely returns to and analyzes more elaborately the system of representative democracy created by the Constitution. One critical aspect, of course, is the arrangement for governmental accountability to the popular majority enforced through the ballot box. Beginning with the original framers, however, there was concern with the possibility of popularly supported, even popularly demanded, governmental oppression of minorities. In part, that concern was addressed by theory: "[R]epresentatives would govern in the

Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

J. ELY, *supra* note 2, at 75-76 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

³⁰ J. ELY, *supra* note 2, at 76 (footnotes omitted).

³¹ *Id.* at 76-77 (footnotes omitted).

interest of the whole people. . . . [E]very citizen was said to be entitled to equivalent respect, and equality was a frequently mentioned republican concern."³² In addition, that concern was addressed in the constitutional text by "listing" certain rights guaranteed to all, as those contained in the Bill of Rights—which, Ely argues, are in turn mainly "procedural"—and by dividing and allocating governmental power both vertically and horizontally. As it happened, however, this was insufficient to guard against majoritarian oppression, so:

[t]he existing theory of representation had to be extended so as to ensure . . . that the representative . . . would not sever a majority coalition's interests from those of various minorities. Naturally that cannot mean that groups that constitute minorities of the population can never be treated less favorably than the rest, but it does preclude a refusal to *represent* them, the denial to minorities of what Professor Dworkin has called "equal concern and respect in the design and administration of the political institutions that govern them." The Fourteenth Amendment's Equal Protection Clause is obviously our Constitution's most dramatic embodiment of this ideal.³³

Judicial review, Ely urges, should be about what the Constitution is about, and

contrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values," . . . in fact the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of disputes (process writ small), and on the other, with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.³⁴

Particularly with respect to the Constitution's open-ended provisions, judicial review should be "participation-oriented" and "representation-reinforcing"; an approach that, "unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entire-

³² *Id.* at 79 (footnotes omitted).

³³ *Id.* at 82 (footnotes omitted). Ely further points out that the essentials of equal protection "process" theory—protecting minorities not by conferring constitutional entitlements or guaranteeing substantive outcomes but by tying their fate to that of the political majority—was well understood and in certain respects both textually expressed and judicially enforced long before adoption of the fourteenth amendment. J. ELY, *supra* note 2, at 83-85.

³⁴ J. ELY, *supra* note 2, at 87. To underscore this point, Ely undertakes a lengthy and interesting—though ultimately collateral and distracting—survey of the Constitution, paying particular attention to those relatively few provisions that appear to address substantive values and pointing out that several of these in fact serve, in whole or in part, procedural ends. *Id.* at 88-101. This survey appears to have led to the criticism that Ely's central thesis, focused as it is upon judicial review maintaining and reinforcing representative democracy ("process writ large"), would dilute judicial enforcements of the Constitution's provisions guaranteeing fairness to the individual ("process writ small"). Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1046-47 (1980). Unless I misread Ely, the criticism is wholly off base.

ly supportive of, the underlying premise of the American system of representative democracy."³⁵

Ely concludes the outline of his model by arguing that entrusting this mode of review to the judiciary makes eminent functional sense:

Our government cannot fairly be said to be "malfunctioning" simply because it sometimes generates outcomes with which we disagree, however strongly (and claims that it is reaching results with which "the people" really disagree—or would "if they understood"—are likely to be little more than self-deluding projections). In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

Obviously our elected representatives are the last persons we should trust with identification of either of these situations. Appointed judges, however, are comparative outsiders in our governmental system, and need worry about continuance in office only very obliquely. . . . [This] put[s] them in a position objectively to assess claims—though no one could suppose the evaluation won't be full of judgment calls—that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.³⁶

In the last two chapters of the book Ely further elaborates and discusses particular applications of his model.³⁷ Chapter Five, entitled "Clearing the Channels of Political Change," pursues the theme announced in paragraph two of the *Carolene Products* footnote—that of judicial review of legislation restricting access to or participation in the political process and the "channels of political change." The main feature turns out to be the first amendment, however, rather than those open-ended constitutional provisions calling for outside reference (except, of course, insofar as first amendment values are enforced against the States through the fourteenth). I mean to imply no criticism by this; rights of speech, press, assembly, petition and political association are so central to the functioning of that government created by the Constitution that if no first amendment had

³⁵ J. ELY, *supra* note 2, at 88.

³⁶ *Id.* at 103.

³⁷ Both chapters appear to be exploratory and suggestive rather than exhaustive of the possible applications of the mode of judicial review Ely advocates.

been textually adopted, the Court would have had to create one by structural implication.³⁸

Ely pursues his "participation-oriented" theme for judicial review in the area of voting rights as well, including the malapportionment cases. He also discusses but rejects on grounds of futility Professor Gunther's call for meaningful equal protection scrutiny of all statutory classifications in order to heighten public awareness of the reasons for legislative decisions, thereby strengthening political accountability.³⁹ Ely concludes by suggesting a substitute for Gunther's proposal—revival of the old nondelegation doctrine.⁴⁰

In Chapter Six, entitled "Facilitating the Representation of Minorities," Ely pursues the theme of the third paragraph of the *Carolene Products* footnote—that of judicial review of legislation "directed at" particular minorities, ones for whom majoritarian prejudice may curtail the protections against oppressive governmental action ordinarily afforded by a pluralistic political system. The concern here is not with barriers to access and participation by minorities in the political process. It is rather with the failure or refusal of governmental officials to *represent* them—a

³⁸ To test the depth of any initial disagreement with this statement, reflect on a law promulgated by the "in" Democrats criminalizing membership in or association with the "out" Republicans. Judicial implication of a first amendment might well have resulted in one significantly different from and less expansive than our textual one; and it might have been rationalized, at least at the federal level, in terms of "lack of governmental power" rather than individual right. But so long as there is conceded to be judicial review at all, its exercise in this area more than any other seems most essential "to prevent[ing] the defeat of the venture at hand." L. HAND, *THE BILL OF RIGHTS* 14 (1958).

³⁹ Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Gunther's proposal, calling for realistic judicial evaluation of statutory classifications in terms of articulated governmental purposes, has never been generally applied by a majority of the Court. A similar analysis has been used in particular areas of equal protection doctrine such as gender discrimination, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648-53 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 212-17 (1977); but see *Michael M. v. Superior Court of Sonoma County*, 101 S. Ct. 1200 (1981), but the underlying constitutional policies seem quite different.

Gunther himself seems to have given up on the full-blown version of his proposal (judging from comparison of the relevant portion of the ninth and tenth editions of G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW*). The analysis continues to surface from time to time, although only in dissenting opinions. E.g., *United States R.R. Retirement Bd. v. Fritz*, 101 S. Ct. 453, 464-69 (1980) (Brennan, J., dissenting); *Schweiker v. Wilson*, 101 S.Ct. 1074, 1087-89 (1981) (Powell, J., dissenting). For myself, I have never understood why, if *truly* convinced that "Congress had no rational reason for [the classification and therefore that] the unexplained difference in treatment must have been a legislative oversight," *id.* at 1089, a judge should not simply apply the statute to reach the result the legislature would have intended, in light of the general statutory policy, had it thought about the matter, rather than engage in presumptively disfavored constitutional adjudication.

⁴⁰ See text accompanying notes 94-118 *infra*.

failure or refusal that may in fact be directly responsive to the desires of the political majority.

Ely begins by arguing that: "Benefits—goods, rights, exemptions, or whatever—that are not essential to political participation or explicitly guaranteed by the language of the Constitution [are] constitutionally gratuitous—though obviously they may be terribly important—and malfunctions in their distribution can intelligibly inhere only in the process that effected it."⁴¹ At bottom, "malfunction" means governmental action inflicting injury upon or withholding benefits from persons simply for the sake of disadvantaging them rather than in pursuit of some other governmental objective. This view takes Ely directly into the problem of the motivation of governmental actors. He recognizes and discusses the difficulties with judicial inquiry into legislative and administrative motivation but, he argues, however we ascertain it and whatever doctrinal label we attach, governmental motivation is the relevant constitutional point—most obviously under the equal protection clause but also frequently under other constitutional provisions such as the first amendment. In a short but very useful section of Chapter Six, Ely demonstrates that the "suspect classification" branch of strict or "special" equal protection scrutiny is simply a technique for flushing out unconstitutional motivation.

In the case of racial classifications disadvantaging blacks, of course, the constitutional justification for proceeding from a basis of suspicion derives from the central historical meaning of the fourteenth amendment. In his most ambitious undertaking, Ely attempts to construct a generalized model for identifying other situations where suspicion regarding governmental motives and therefore a searching judicial inquiry is warranted.⁴² The issue is what other classifying characteristics are "like race" in the relevant constitutional sense, and Ely reviews and discusses the difficulties with factors frequently mentioned: Immutable traits? That doesn't help aliens, or illegitimates in many cases. And what about intelligence? Discrete and insular political minorities? That description potentially fits every group losing a political battle (as some group almost always will whenever a political decision is made). Rather, the proper starting point is found in the *Carolene Products* footnote, which refers to "prejudice against discrete and insular minorities," illustrated by references to religion, national origin and race.⁴³ Accordingly:

⁴¹ J. ELY, *supra* note 2, at 136.

⁴² This is, of course, a problem that has bedeviled the Supreme Court in recent years, most obviously in the cases of laws classifying on the basis of gender, alienage and illegitimate birth. See also *Schweiker v. Wilson*, 101 S.Ct. 1074 (1981) (mental illness).

⁴³ In support of this point and his broader theory, Ely might usefully have drawn on *Hernandez v. Texas*, 347 U.S. 475 (1954), where the Court equated governmental actions disadvantaging Mexican-Americans to those disadvantaging blacks:

Throughout our history differences in race and color have defined easily iden-

If the doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members—it would seem to follow that one set of classifications we should treat as suspicious are those that disadvantage groups we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure.⁴⁴

Emphasizing the central point that it is failure to represent certain citizens—to treat them as worthy of equal governmental concern and weigh their interests in a relatively neutral manner—that is inconsistent with the premises of the constitutional system of representative democracy and violative of the equal protection clause, Ely argues further that it is not only overt hostility towards and vilification of particular minority groups (“‘first-degree prejudice’”)⁴⁵ that can cause malfunction in the representation process. Rather, certain forms of stereotyping, among which racial prejudice and its first cousins are only the most obvious and virulent types, constitute a more generalized problem. Not all stereotypes are impermissible, of course, since stereotypes are what the legislative generalizations we call statutes are always premised on. Rather it is certain “we-they” stereotypes that pose the danger of constitutional malfunction in the process of representative government. “We” means the majority of the political community and most governmental officials sharing a trait in common; “they” means the minority of the community possessing the countertrait. The constitutionally relevant myths, stereotypes or generalizations are those reflecting favorably upon, and showing attitudes of superiority about, persons possessing the majority trait and reflecting negatively upon, and showing attitudes of inferiority about, the group sharing the minority countertrait. As a matter of normal human behavior—and Ely supports his thesis by reference to social science literature—such myths are readily accepted and acted upon by governmental officials. When this happens, minority group members are denied equal representation because governmental decisions adversely af-

tifiable groups which have at times required the aid of courts in securing equal treatment under the laws. *But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact.* When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a “two-class theory”—that is, based on the differences between “white” and Negro.

Id. at 478 (emphasis added). Maybe Ely shied away from *Hernandez* in light of the perverse way in which the last sentence quoted was recently used. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978).

⁴⁴ J. ELY, *supra* note 2, at 153.

⁴⁵ *Id.* at 162.

fecting them are not the product of a process calculated to yield reasonably accurate assessments of the social costs and benefits resulting from such decisions.⁴⁶

Ely proceeds to combine this insight with other techniques of analysis so as to identify the sorts of classifications that should warrant judicial suspicion. However, the going gets rough, and Ely's analysis becomes more suggestive than rigorous, ultimately coming across as incomplete and, in some respects, unconvincing. The general approach is that courts should "focus on whether something is blocking the opportunity to correct the stereotype reflected in the legislation."⁴⁷ At this point, Ely suggests, factors such as the immutability of the trait and the insularity of the minority group possessing the trait may play useful supporting roles in identifying the most prevalent forms of favorable "us"/negative "them" generalizations likely to lead to malfunction in the representative process. If the trait is immutable, or nearly so, few if any of "us" have ever been "them" and thus it is more likely that "our" generalizations about the differences between "us" and "them" are both usually inaccurate and readily, even habitually, accepted as a basis for decision. The same is true with insularity, though Ely here means insularity from the mainstream community in the broad societal rather than merely political sense—the more insular "they" are from "us," the less likely it is that many of "us" have been in close contact with "them," which is also calculated to generate and sustain the most widespread and least accurate stereotypes.

Employing this analysis, Ely discusses youth and old age classifications (which he concludes are not suspicious), alienage classifications (which are), and poverty classifications (which are, but this does not help the poor much), and he argues that classifications disadvantaging homosexuals should be strictly scrutinized although he concedes that laws criminalizing such conduct are constitutional. Ely closes this part of the chapter with an interesting and provocative discussion of gender classifications that is likely to displease the committed on both sides of the current debate.⁴⁸

The last portions of Chapter Six deal with issues that appear to have in common only a want of someplace else to put them. They include a short "aside" on affirmative action,⁴⁹ a brief discussion of how Ely's approach to judicial review can also inform interpretation of more "specific" con-

⁴⁶ Most governmental decisions do not involve this danger for there is usually no strong correlation between a majority of governmental officials and a majority of the political community in terms of possessing the relevant trait. Hence, for example, there is no reason for special scrutiny of a legislative decision advantaging optometrists and disadvantaging opticians. *Id.* at 155-56; see *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

⁴⁷ J. ELY, *supra* note 2, at 165.

⁴⁸ See *id.* at 164-70.

⁴⁹ I suggest reading instead Ely, *Reverse Racial Discrimination*, *supra* note 3.

stitutional provisions relating to fair procedure, using the fourth and eighth amendments as illustrations, and a brief but provocative discussion of the so-called "right to travel."

II

Ely's contention that judicial review should be about what the Constitution is about—that it should draw its sustenance from and serve to reinforce and protect the central and interrelated structural components of the Constitution—is obviously intuitively appealing. And unlike others,⁵⁰ I find persuasive his insistence that those structural components reflect primarily dynamic, process-oriented themes, and his conclusion that content for the Constitution's open-ended provisions should be derived from the document's over-arching theme and purpose—the political system it was drafted to create. In addition, his elaborations of the model, while exploratory, are always intriguing and often quite persuasive.

On the other hand, given its centrality to his thesis, it is quite troublesome that Ely presents, and erects the elaborate superstructure of theory in Chapters Five and Six on the basis of, what is at best a brief and fragmentary analysis of the constitutional system of representative democracy. I also find it at least counter-intuitive that those last two chapters of the book, elaborations of *Carolene Products* footnote paragraphs two and three respectively, fly off in quite separate directions with a notable lack of later effort systematically to connect them. Furthermore, I firmly believe that by the end of his analysis of the problem of judicial enforcement of governmental representation of unpopular minorities, Ely has run quite badly off the track. In the following pages, I discuss these difficulties in reverse order and widely varying degrees of depth.

At least in the most virulent forms, governmental actions denying equal protection originate in widespread majoritarian prejudice against and hostility towards particular minority groups. But, Ely says, never mind whether that hostility is "unjustified"; for a court to make that assessment is impermissibly to intrude upon the decisionmaking processes reserved to the political branches of government.⁵¹ The initial question for the court is simply whether such hostility exists. If so, the court must ascertain whether a law singling out such a group for disadvantageous treatment realistically serves some substantial governmental purpose. And even if it does, if that purpose would be better served by an alternative classification, the court is justified in concluding that the real governmental purpose (or at least one of the purposes) is to disadvantage the unpopular

⁵⁰ *E.g.*, Tribe, *supra* note 27; Tushnet, *supra* note 34.

⁵¹ J. ELY, *supra* note 2, at 153-54.

group. In that event, the members of the group have been denied equal protection of the laws since they are being harmed for the sake of that harm rather than in pursuit of some other objective.

The case of laws disadvantaging burglars (surely an unpopular minority group), as by criminally sanctioning their conduct, is easily handled within the model. The classification corresponds perfectly to the legitimate governmental purpose of keeping such persons out of other people's homes.⁵² When Ely gets to the case of homosexuals, concededly another unpopular group, he finds that laws criminalizing that behavior are also constitutionally permissible. The court may not second-guess the majoritarian judgment that such conduct is immoral and undesirable—Ely, of course, must concede this, given his rejection of judicial review premised upon identifying nontextual “fundamental values” deserving special judicial protection—and use of the criminal sanction fits well with the governmental purpose of deterring it. He argues, nevertheless, that other sorts of laws disadvantaging homosexuals—barring them from public employment, for example—should rarely, if ever, survive equal protection analysis.⁵³ Such rules, originating in widespread community hostility, continue the group's isolation and reinforce majoritarian prejudice by blocking the avenues of contact and relationship formation that might lead to attitudinal and eventually political change.

Ely's analysis of the homosexual case puts me in a quandary, however, when applied to the burglars. What about laws that civilly disable burglars as by barring them from employment? Ely himself concedes the validity of such laws,⁵⁴ but if the same analysis obtains as in the case of the homosexual (and I can identify no element of his model which justifies a different conclusion), laws disadvantaging burglars by imposing civil disabilities should be subject to the same strict scrutiny and likewise rarely survive.⁵⁵

Perhaps the difference is that civilly disabled burglars have been criminally convicted of an offense whereas ordinarily the homosexual barred from employment has not.⁵⁶ In the alternative, maybe Ely has the

⁵² *Id.* at 154.

⁵³ “[L]aws denying homosexuals certain benefits, most likely occupational opportunities, must be defended in terms of a virtually perfect fit with a legitimate and substantial goal. This will seldom, if ever, be possible.” *Id.* at 255 n.92.

⁵⁴ *Id.* at 250 n.65. He notes that there would be an ex post facto problem, however, if such disabling legislation were enacted and applied after the conviction.

⁵⁵ This is not to say that under such an approach a law discriminating against burglars could never survive equal protection scrutiny. A rule barring persons with a burglary conviction from employment as a security guard would fit pretty well with an obvious and legitimate governmental purpose. However, denying burglars a medical license, the case which Ely discusses, *id.* at 250 n.65, seems a quite different matter.

⁵⁶ I certainly would not like a distinction which forced the government to use the criminal sanction rather than milder forms of penalties to punish and deter undesirable conduct, nor do I see any constitutional justification for it. Furthermore, distinguishing between burglars

burglar's case wrong, and his process reasoning should lead to the result that civil disabilities afflicting ex-felons as a group are generally invalid. Grossly inaccurate "we/they" stereotypes are probably even more prevalent in the case of convicted felons than in the case of homosexuals. These group generalizations prompt disadvantageous governmental rules that in turn reinforce insularity and block the "we/they" contact that might lead to greater understanding and attitudinal change.

I think, however, that it is rather the homosexual case that Ely has gotten wrong. Something quite different is going on in the homosexual and burglar case as compared to the classic "suspect classification" case of race. Expressing popular moral opposition to the burglar's and homosexual's conduct is conceded to be a legitimate object of governmental policy. Therefore, quite apart from the fact that laws disadvantaging persons who engage in that conduct will ordinarily fit well with the governmental interest in deterrence, harming such persons who engage in that conduct for the sake of that harm alone *is* legitimate so long as retribution is a proper end of the law.⁵⁷ Injuring blacks for the sake of injuring them, on the other hand, clearly contravenes the central meaning of the fourteenth amendment.

I think the constitutional distinction between the homosexual case and traditional suspect classifications such as race lies in the following direction. To encourage people to join the majoritarian community, to share its values and behave in popularly approved or accepted ways, is a legitimate object of governmental policy except insofar as the Constitution expressly or by fair implication provides otherwise (most obviously, in the areas of speech, religion and political association). What is illegitimate—at odds with the system of representative democracy Ely describes and constituting a denial of equal protection—is governmental action calculated to maintain the separateness between unpopular and prejudice-burdened groups and the majority community and keep the unpopular "in their place"—governmental action for the purpose of preventing or impeding the efforts of members of such groups to join the cultural, economic and social mainstream and participate fully in the benefits and responsibilities of civil society.

To construct a general theory explaining that equal protection commanded by the Constitution and identifying those instances in which the processes of representative government have impermissibly malfunctioned,

and homosexuals on this ground is irrational in terms of the permissible governmental purpose of deterring conduct that is otherwise reasonably likely to occur in the future.

Although far from persuasive in terms of Ely's theory, it might be argued that civil disabilities affecting convicted felons should be treated as a special case by extension of the reasoning in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

⁵⁷ I see nothing in the Constitution to suggest that it is not. Ely does not discuss the point. If ever the eighth amendment's ban on cruel and unusual punishment might speak to this issue as reflective of societal consensus, today is not that day.

we need to understand what other group traits are, as Ely says, "like race in some relevant sense."⁵⁸ Focusing upon widespread majoritarian prejudice and hostility and detecting the infliction of harm for its own sake rather than in pursuit of some other governmental objective are important considerations.⁵⁹ Contrary to Ely's contention, however, the Court cannot avoid the question whether that majoritarian prejudice reflected through governmental action is "unjustified" in some relevant sense,⁶⁰ and the fourteenth amendment is reasonably suggestive as to which "justifications" are constitutionally out of bounds.

The most important sentence of the fourteenth amendment is the one with which it begins:⁶¹ "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."⁶² Conferring the status of citizenship was the single most important measure that could have been taken by the framers of the fourteenth amendment to remedy the historical problem most centrally involved—full emancipation for the freedmen with the right to participate in and enjoy the benefits of civil society. The subsequent clauses of section 1—privileges or immunities, equal protection and due process—must be understood as supportive of and as particular structural means to ensuring the goal of citizenship status. The equal protection clause in particular is first and foremost, if not exclusively, a command that governmental decisions proceed on the basis of the fundamental proposition of full and equal citizenship.

As Justice Douglas frequently reminded us,⁶³ the antithesis of equal citizenship is "caste," maintaining rigid group distinctions by assigning status to individuals on the basis of ascriptive characteristics and denying them opportunities for social, political and economic mobility. A caste system arises from group-based prejudice, fear and hostility, leading to cultural mores mandating separateness and behavioral differences. Those rules in turn reinforce group prejudice and hostility by perpetuating stereotypic behavior and attitudes concerning group inferiority and superiority, and by denying the opportunities for contact and the forma-

⁵⁸ J. ELY, *supra* note 2, at 149.

⁵⁹ The inquiry must be sufficiently flexible to deal with variations at the state and local levels. See *Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

⁶⁰ See Baker, *Neutrality, Process and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1046-49 (1980).

⁶¹ See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 33-66 (1969); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977). But see A. BICKEL, *THE MORALITY OF CONSENT* 33-54 (1975).

⁶² U.S. CONST. amend. XIV.

⁶³ *E.g.*, *Johnson v. Louisiana*, 406 U.S. 356, 387 (1972) (Douglas, J., dissenting); *Wright v. Rockefeller*, 376 U.S. 52, 61-67 (1964) (Douglas, J., dissenting); *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring). See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 444-49 (1968) (Douglas, J., concurring); *Bell v. Maryland*, 378 U.S. 226, 242-60 (1964) (Douglas, J., concurring in part); *Garner v. Louisiana*, 368 U.S. 157, 185 (1961) (Douglas, J., concurring).

tion of relationships that would undermine existing sentiment. The more effective a caste system is, the more its effects will be intergenerational. The fourteenth amendment renders impermissible governmental actions undertaken for the purpose of perpetuating these self-reinforcing cultural cycles.

Ely correctly focuses upon widespread dislike, hostility and prejudice toward certain minority groups as indicia of the likelihood of illicit governmental motivation, but the category of impermissible—constitutionally illegitimate—governmental purposes that result from such popular sentiment is not limited to the infliction upon minorities of harm for its own sake. Rather it also includes purposes to keep members of such groups separate and apart from the majority, and in a status that is inferior as defined by popular criteria.⁶⁴ Although it may be ever so popular with the majority, governmental action calculated to prevent persons from gaining access to the mainstream community and participating in its responsibilities and benefits is to treat such persons as if they were not citizens of the civil society; it is governmental deprivation of the very status the fourteenth amendment confers and guarantees.

Ely's insight that malfunction in the process of representative government is not limited to expressions of "first-degree" prejudice—conscious emotions and sentiments reflecting hostility and leading to affirmative intention to harm—is quite crucial here. Subjective good faith on the part of governmental decisionmakers notwithstanding, unreflective and reflexive acceptance of pernicious "we/they" generalizations⁶⁵ will deny members of the minority group equal representation and hence equal protection. But it is also crucial to recognize that such derogatory group generalizations—which are no less common nor any less likely to be governmentally acted upon than sentiments reflecting outright hostility or overt prejudice—will often underlie facially neutral governmental rules that disproportionately disadvantage such minorities just as they do rules that classify on the basis of the minority trait.⁶⁶

⁶⁴ Admittedly, the two are often closely intertwined, but the second seems the more prevalent if judged by the American experience.

⁶⁵ Again, "we/they" generalizations are those that relate to groups—majority and minority—defined by a trait possessed in common by the political majority and a majority of elected governmental officials and not possessed by the minority. The minority so defined is, at least ordinarily, the object of dislike, prejudice and hostility by a large segment of the community majority, whether or not such overt hostility or prejudice is consciously felt or acted upon by governmental officials. The generalizations that are of concern are those reflecting the superiority of "us" and the inferiority of "them."

⁶⁶ For a classic illustration, see *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), which involved the use of standardized intelligence tests for purposes of placing public school children in special classes for the "educable mentally retarded." Use of the tests resulted in vastly disproportionate numbers of black children being placed permanently in what were "conceived of as 'dead-end classes.'" *Id.* at 941. Given numerous indications that the objectivity of the tests was questionable, including evidence of cultural bias, *id.* at 956-60, the lack of any ef-

This should mean that the subjective motivation analysis currently in vogue in the disproportionate impact cases such as *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁶⁷ where the fourteenth amendment's proscription of invidious racially discriminatory purpose is translated into a requirement that plaintiffs prove subjective bad faith on the part of governmental actors, is in need of serious rethinking. Problems of proving subjective intent wholly aside, governmental action motivated by overt hostility is not the only way—and these days is perhaps not even the major way—in which racial minorities and others constitutionally like them are injured by malfunctions in the representation process. Analytical techniques are needed to flush out and condemn at least the more important instances of these other varieties of equal protection denial as well.⁶⁸ Unfortunately, Ely does not pursue this line of inquiry and appears to approve of the Court's reasoning in *Arlington Heights*.⁶⁹

The point is further illustrated by reference to Ely's relatively breezy rejection of meaningful equal protection scrutiny in most instances of governmental action disadvantaging the poor⁷⁰ and his failure to analyze the "fundamental rights or interests" branch of equal protection doctrine.⁷¹ I believe the two are related.

Notwithstanding Supreme Court dicta to the contrary,⁷² poverty "standing alone" is a suspect classification. Roughly since *Edwards v. California*,⁷³ statutes which facially classify on the basis of indigency and which have the effect of disadvantaging the poor have been constitutionally "suspect" and subject to the same strict scrutiny as attends racial classifications having the effect of disadvantaging racial minorities. Certainly the ingredients justifying suspect classification treatment obtain—not only "we/they" stereotyping originating in majoritarian prejudice and

fort to validate the test for black children, *id.* at 970-71, and substantial indication that test performance was a less accurate predictor of academic performance in the case of black children, *id.* at 972-73, the court concluded that continued use of the tests by school officials was "consistent only with an . . . [unproven] assumption of a higher incidence of mental retardation among blacks . . .," *id.* at 933.

⁶⁷ 429 U.S. 252 (1977).

⁶⁸ It is this difficulty and line of inquiry that Justice Stevens appears to be pursuing with his legislative "impartiality" notion and his insistence that disparate impact cases should be decided on the basis of objective criteria rather than subjective motivation. *E.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 83-92 (1980) (Stevens, J., concurring in judgment); *Washington v. Davis*, 426 U.S. 229, 252-56 (1976) (Stevens, J., concurring). See also *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

⁶⁹ J. ELY, *supra* note 2, at 137 & n.9.

⁷⁰ J. ELY, *supra* note 2, at 148-49, 162.

⁷¹ See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁷² *Harris v. McCrae*, 448 U.S. 297, 323 (1980).

⁷³ 314 U.S. 160, 181 (1941) (Douglas, J., concurring); *id.* at 184-85 (Jackson, J., concurring). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-33 to -35 (1978).

widespread social hostility and vilification but also popular desire on the part of the majoritarian community to keep itself and its culture separate and apart from the poor. The elements of a caste system are certainly present; while poverty is obviously not an immutable trait like race in each individual case, the strength of the intergenerational correlation cannot be denied.

Ely does conclude that indigency classifications should be treated as suspect but, he contends, "[a] theory of suspicious classification will . . . be of only occasional assistance to the poor, since their problems are not often problems of classification to begin with."⁷⁴ His point—and the only intelligible meaning that can be given to those judicial dicta⁷⁵—is that statutes facially classifying on the basis of poverty are rare; ordinarily legislation merely disproportionately disadvantages the poor, as by charging a standard fee for a governmentally provided service. In Ely's view, apparently, facially neutral governmental rules having only a disparate impact on the poor—that is, unaccompanied by proof of subjective motivation intentionally to disadvantage—easily survive equal protection scrutiny since such rules need only bear the traditional rational relationship to some legitimate governmental purpose.⁷⁶

It is precisely in the area of governmental actions disproportionately disadvantaging groups such as the poor, however, that the "fundamental right or interest" branch of equal protection doctrine occasionally has been, and more frequently should be, invoked. Surely some such explanation must underlie the decision in *Shapiro v. Thompson*,⁷⁷ invalidating a one year state residency requirement to qualify for welfare payments. Formally, perhaps, the statutory rule was subjected to strict equal protection scrutiny and invalidated because it treated persons differently based upon their exercise of the "right to travel" or migrate from state to state. Yet that decision simply cannot be understood as involving only unequal treatment based on the exercise of a fundamental right. Rather, it was crucial to the decision that the law disproportionately disadvantaged in the exercise of that right members of a group that would receive the protection of "suspect classification" strict scrutiny in cases of statutes facially singling it out.⁷⁸ When later confronted with another statute classifying on the basis of exercise of the same "fundamental right" but having a far more neutral effect in terms of popular attitudes towards the group

⁷⁴ J. ELY, *supra* note 2, at 162.

⁷⁵ *Harris v. McCrae*, 448 U.S. 297, 323 (1980).

⁷⁶ In fact, Ely would dispense altogether with "rational basis" equal protection analysis, J. ELY, *supra* note 2, at 251 n.69, a suggestion with which I wholly concur.

⁷⁷ 394 U.S. 618 (1969).

⁷⁸ Indeed, the same impermissible purpose that justifies the use of "suspect classification" treatment for this group—the intent to discourage the poor from migrating because they are poor—was in fact argued by the state to be one of the purposes underlying the rule. *Id.* at 627-31.

disadvantaged—a one year residency requirement for a divorce—the Court quite properly found the right not to have been impermissibly infringed.⁷⁹

"Fundamental right" or "interest" equal protection doctrine has served and properly should serve a function quite similar to that of its cousin, the "suspect classification". Ely convincingly demonstrates how the suspect classification construct serves as a handmaiden to motivation analysis. When a racial group, for example, is the object of widespread social hostility and prejudice, the Court is properly suspicious of statutes classifying on the basis of that racial characteristic to the detriment of that group. The suspect classification mode of analysis, insisting that such classifications be not merely rationally related to some conceivable governmental purpose but rather demonstrated by the state to be *necessary* to the achievement of a substantial and legitimate purpose identified by the state, serves to flush out and condemn that illegitimate purpose we suspect is involved—the disadvantaging of the group as a reflection of community prejudice and hostility. In a similar fashion, strict scrutiny of rules unequally impeding the exercise of or denying access to "fundamental" rights or interests can serve to flush out and condemn governmental decisions tainted by unreflective acceptance of derogatory generalizations about "them"—governmental rules that, while not facially employing a "suspect" classification, do disproportionately disadvantage groups defined by characteristics that would be treated as suspect if overtly used as the basis for governmental action.⁸⁰

The rub comes, of course, in identifying which rights or interests should be treated as "fundamental" for purposes of strict equal protection scrutiny. One possibility is to do what the Burger Court frequently says it has done—limit "fundamental rights or interests" to those marked as special by other provisions of the Constitution⁸¹—but that gets the equal protection point all wrong. A very different approach is justified here, one I believe to be susceptible of principled application, responsive to the

⁷⁹ *Sosna v. Iowa*, 419 U.S. 393 (1975). Compare *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (invalidating residency requirement for indigent medical care), with *Starns v. Malkerson*, 401 U.S. 985 (1971) (affirming decision upholding one year residency requirement for in-state university tuition).

⁸⁰ It is worth noting that the fourteenth amendment calls for "equal protection of the laws" and does not refer to "classifications," statutory or otherwise. While "classification" on the basis of race or other suspect criteria may often be the most direct means to the constitutionally impermissible end, it is certainly not the only means. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (use of poll taxes and literacy tests for voting); Rothstein, *The Politics of Legal Reasoning: Conceptual Contests and Racial Segregation*, 15 VAL. L. REV. 81, 97 n.52 (1980).

⁸¹ See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). But see *id.* at 34 nn.73 & 76. Apart from the voting and, presumably, the ballot access cases, it is unclear how Ely would treat the "fundamental interest" branch of equal protection doctrine under his model.

constitutional policies expressed by the equal protection clause, consistent with Ely's representation-reinforcing theory of judicial review and, indeed, not infrequently employed by the current Court although it often labels what it is doing as something else.⁸²

When a facially neutral governmental rule or decision has disproportionately disadvantageous effects, an appropriate inquiry is to assess the type of good that is being disproportionately denied the racial minority or the poor or any other group there is good reason to suspect the community majority of wanting to keep out of its ranks in terms of the centrality of the good to the ordinary channels of individual mobility in contemporary society. A "right" or "interest" is relatively "fundamental" in this sense not because judges, moral philosophers, American tradition, or some other provision of the Constitution rank it as relatively "more important" than others. Rather, it is "fundamental" because its disproportionate denial does just what the popular majority and therefore our governmental officials are suspected of impermissibly wanting to do—perpetuating caste and, in turn, reinforcing private hostility and prejudice by blocking or impeding access to the mainstream community.⁸³

Shapiro v. Thompson fits comfortably within this mold: the classification there effectively impeded many of the poor (and only the poor) from exercising what most would concede to be one of the most basic modes of social, economic and political mobility in this society—interstate migration.⁸⁴ The cases involving political franchise and candidate restric-

⁸² See text accompanying notes 84-91 *infra*.

⁸³ On this view, cases such as *James v. Valtierra*, 402 U.S. 137 (1971) (rejecting equal protection challenge to state constitutional provision requiring approval of low-income housing by special community vote); and *United States v. Kras*, 409 U.S. 434 (1973) (rejecting equal protection challenge to large filing fee for bankruptcy as applied to indigents) are wrongly decided. On the other hand, a case such as *Wyman v. James*, 400 U.S. 309 (1971) (rejecting challenge to welfare rule requiring warrantless home visit for nonconsenting recipients), is not incorrect as an equal protection matter even though another constitutional value—the fourth amendment—is implicated. One might well question, however, the neutrality of a fourth amendment doctrine that decides *Wyman* this way and yet holds to be impermissible warrantless searches of factories by OSHA inspectors. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); see Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, LAW & CONTEMP. PROB., Summer 1980, at 66.

⁸⁴ This "fundamental interest" aspect of equal protection doctrine traces back at least to *Brown v. Board of Educ.*, 347 U.S. 483 (1954). At a time when the Court was apparently unwilling to reject as impermissible all governmental rules premised on notions of "separate but equal"—a notion we have since come to view as fundamentally at odds with the fourteenth amendment's promise of equal citizenship—a significant part of the Court's reasoning rested upon its assessment of the "importance" of public education at that point in the nation's history. The Court emphasized the relationship between public education and the individual child's "awakening . . . to cultural values," his ability to exercise the responsibilities of citizenship and his opportunities for social and economic mobility. *Id.* at 493. Something of this view regarding public education may continue to guide the Court today. Witness the equal protection analysis in the presence of disproportionate racial impact in the public school area, *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979), as compared to the "bad subjective motive" standard the Court seems

tions also fit well within this model.⁸⁵

Certain recent decisions arguably reflect the same concerns although the Court has unfortunately used "fundamental right" substantive due process reasoning to get to the end result.⁸⁶ Although the plurality opinion in *Moore v. City of East Cleveland*⁸⁷ invoked substantive due process and emphasized the "fundamental interest" in the family generally in invalidating a law forbidding certain extended family living arrangements in a suburb zoned for single family dwellings, the disproportionate effect of such a law in excluding poor families from the community and the importance of extended family units to the care and rearing of poor children were clearly the core of concern on the part of certain members of the plurality.⁸⁸

(hopefully temporarily) to have saddled itself with in other areas of governmental action yielding disproportionately disadvantageous effects upon racial minorities, *e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion).

⁸⁵ *E.g.*, *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating large filing fees for political candidates as applied to indigents); *Bullock v. Carter*, 405 U.S. 134 (1972) (same); *Turner v. Fouché*, 396 U.S. 346 (1970) (invalidating restriction of political office to property owners); *Phoenix v. Kolodziejewski*, 399 U.S. 204 (1970) (invalidating restriction of franchise to property taxpayers); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (invalidating poll tax). Although Ely might explain these cases as straightforward "political participation" decisions, *see* J. ELY, *supra* note 2, at 120, it is doubtful that they can be fully explained without reference to the disproportionate impact the invalidated rules had on the poor. Certainly the Court has been willing to sustain franchise restrictions favoring the wealthy and disadvantaging the majority. *Ball v. James*, 101 S. Ct. 1811 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). *See also* *Gordon v. Lance*, 403 U.S. 1 (1971).

⁸⁶ Ely, of course, strongly criticizes the Court's return to substantive due process methodology, under which it specifies particular nontextual values as "fundamental" and holds them entitled to extraordinary protection from the ordinary operations of the political process. *See* J. ELY, *supra* note 2, at 43-72. I agree with that analysis. It has never been clear to me why, for example, if the majority of us come to decide that autonomy in reproduction, marriage, family or whatever is less important than our forerunners thought and we are therefore willing to subject ourselves to modes of governmental behavior more intrusive on those relationships for the sake of some politically agreed-upon objective—say, population control or the protection of children—the Court should in the name of natural law, tradition, "consensus" or whatever tell us we cannot do it. The argument above attempts to distinguish the "fundamental interests" branch of equal protection analysis as something quite different justifiable in terms of Ely's own theory, emphasizing, *inter alia*, judicial insistence that government treat members of minority groups tainted by community prejudice as full citizens at the point of political decision.

⁸⁷ 431 U.S. 494 (1977).

⁸⁸ *Id.* at 507-10 (Brennan, J., joined by Marshall, J., concurring). Obviously, the "fundamental interest" mode of strict equal protection scrutiny advocated above, no less than any other doctrinal method, requires judgment and is susceptible of manipulation and misuse. Even under that approach, *Moore v. City of East Cleveland* is a problematic decision. The best that can be said for the plurality's result is that a prophylactic rule against such zoning laws will forbid attempts by white or upper income suburbs to further segregate the urban poor by disallowing extended family living patterns. Prophylactic rules can have counterproductive effects in particular applications, however, as when living patterns in stable, racially integrated communities are disrupted, leading to white flight and resegregation. It is ironic, especially given the strong correlation between race and poverty, but nonetheless possible that par-

Similarly, although the plurality opinion in *Zablocki v. Redhail*⁸⁹ purported to employ "fundamental interest" equal protection doctrine in invalidating a law forbidding marriage by certain persons with outstanding child support obligations, the Court's analysis, emphasizing the traditional importance of marriage in our society, smacks almost entirely of the new substantive due process.⁹⁰ Justice Stevens, concurring in the judgment, got the point right. Observing both the tenuous relationships between the statute's particular classifications and the permissible governmental objectives that the state identified *and* the various counterproductive impacts on the upwardly mobile poor, he concluded that the statute was a "clumsy and deliberate legislative discrimination between the rich and the poor. . . ."⁹¹ In particular, Justice Stevens twice adverted to that illegitimate status the marriage-forbidding statute would cast upon the children of poor couples who would, marriage or no, proceed to beget. This is precisely the sort of caste-reinforcing intergenerational effect that should command a court's rapt attention when facially neutral statutes

ticular governmental actions encouraging racial integration will disproportionately disadvantage the poor. Use of "tipping point" housing and school integration plans, for example, may have such effects, and it is certain that the Court will be called upon to struggle with such difficult issues in the years ahead. See *Johnson v. Board of Educ. of Chicago*, 604 F.2d 504 (7th Cir. 1979), *vacated*, 449 U.S. 915 (1980); Note, *Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration*, 93 HARV. L. REV. 938, 940-47 (1980).

The best resolution of the *Moore* case may well be Justice Stevens', viewing the ordinance as applied to Ms. Moore's own home as an unreasonable use regulation resulting in a taking of property without compensation. 431 U.S. at 513-21 (Stevens, J., concurring in judgment). This leaves open the possibility that integrated communities could impose such zoning restrictions on rental property. Cf. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290-91 (7th Cir. 1977) (in sustaining challenge under Fair Housing Act to refusal to rezone property to permit construction of low-cost housing, the Court indicated that disproportionate impact is to be measured not only by reference to groups adversely affected by consequent exclusion, but also by reference to degree of integration currently existing in community). Moreover, the ownership and use of property is a critical channel of mobility in this society and restrictions on property use that disproportionately disadvantage the poor *should* often be seen as abridging a "fundamental interest" under the analysis in the text. See generally *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); L. TRIBE, *supra* note 73, at § 16-41.

⁸⁹ 434 U.S. 374 (1978).

⁹⁰ *Id.* at 383-87. It was that emphasis on the "fundamental" interest in marriage *qua* marriage that gave the plurality, *id.* at 387 n.12, the Chief Justice writing separately, *id.* at 391, and Justice Powell concurring in the judgment, *id.* at 396-99, great difficulty in distinguishing the case from obviously permissible state regulations of the marriage relationship and the decision in *Califano v. Jobst*, 434 U.S. 47 (1978), and opened the way for Justice Rehnquist's most powerful point in dissent, 434 U.S. at 407-08.

⁹¹ 434 U.S. at 406.

In sum, the public-charge provision is either futile or perverse insofar as it applies to childless couples, couples who will have illegitimate children if they are forbidden to marry, couples whose economic status will be improved by marriage, and couples who are so poor that the marriage will have no impact on the welfare status of their children in any event.

bear disproportionately on groups protected from overt discrimination under the suspect classification branch of equal protection analysis.

Without more affirmative governmental assistance, some of the poor may never escape their status; many others may be several generations in doing so. But what they all as citizens are entitled to is equal protection of the laws—protection from caste-reinforcing legislation that, whether hostilely motivated or merely reflective of unconscious acceptance of derogatory generalizations about “them,” drastically and unequally impedes their efforts to escape.⁹²

III

I noted above that Ely’s elaboration of his model of judicial review proceeds on the basis of what is at best a brief and fragmentary analysis of the constitutional core of the political system the courts are supposed to be reinforcing. I am not certain whether the deficiency I perceive in Ely’s treatment of the problem of governmental representation of minorities is related to this lack of a more thorough going analysis of our political system of representative democracy. I suspect, however, that there is at least a loose connection between the two, and that there is a closer affinity between the second and third paragraphs of the *Carolene Products* footnote—indeed, among all three paragraphs of the footnote—than Ely has developed thus far.

In simple if not simplistic outline, my suggestion is that the existence and maintenance over time of a relatively fixed, sizable and intergenerational group of community outcasts will threaten, just as it did in

⁹² Perhaps contrary to Ely’s view, see J. ELY, *supra* note 2, at 157-61, it is important to observe that with respect to the disproportionate effects cases no less than those in which the government overtly employs a suspect criterion, the impermissibility of governmental action premised upon “positive we/negative them” generalizations is not necessarily a function of the relative accuracy or inaccuracy of the stereotype. Social separation and class or caste mores do generate and reinforce common behavioral patterns among group members, which behavior in turn reinforces those mores and may frequently make some of “our” derogatory generalizations about “them” reasonably accurate. The constitutional point is that such group generalizations, whatever their relative accuracy in comparison to the mine-run of legislative generalizations, should not be permitted to justify governmental action substantially and disproportionately impairing or denying important opportunities or avenues for social mobility by individual members of the “them” group when more precisely focused means of achieving legitimate governmental objectives are available. The sophistication of the analysis in *Lane v. Wilson*, 307 U.S. 268 (1939) should be extended well beyond the obviously intentional discrimination perpetuated by means of a facially neutral rule in that case:

[T]he opportunity . . . given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined. The restrictions must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise.

Id. at 276.

antebellum America, the long term survivability of an open, pluralist and relatively democratic political system for two interrelated reasons. The first is the high probability that some substantial portion of the society, consisting of members of the outcast group and their sympathizers, will come to reject the essential legitimacy of a political system that yields such results. When that occurs, such persons will not confine their political activities to those means acceptable to and consistent with an open and pluralist political system. The second is that the majoritarian response to such behavior, to be effective in repressing it, must itself be inconsistent with and tend permanently to undermine the essential features of an open and relatively democratic political system and its necessarily concomitant guarantees of civil liberty for the individual.⁹³

Whatever the validity of the foregoing hypothesis, it is clear that Ely's own conception of the constitutional system of representative democracy is insufficiently developed. Perhaps the best single illustration of this is his argument that the nondelegation doctrine should be revived. While generally content to view the essence of the American political system in terms of traditional pluralist theory,⁹⁴ in advocating a nondelegation doctrine Ely adopts a proposal whose leading proponent is also a leading critic of pluralist political theory.⁹⁵ At a minimum, such a shift would seem to call for explanation in terms of deeper theory than Ely gives. Moreover, I believe the argument for the nondelegation doctrine to be just plain wrong as a matter of judicially enforceable constitutional law.

The problem these days, Ely says, is that too much of our law is actually made by "faceless bureaucrats"—nonelected and politically unaccountable officials in the executive branch and administrative agencies—pursuant to open-ended delegations of authority from the Congress. Legislators enact such statutes because doing so allows them to avoid hard political choices and the political heat from constituents that controversial rules generate.⁹⁶ The result, says Ely, is "undemocratic": "[B]y refusing to

⁹³ Although the decision in the case may be justifiably out of favor, Justice Frankfurter made the point as well as any in *Minnersville School Dist. v. Gobitis*, 310 U.S. 586 (1940): "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization."

Id. at 596.

⁹⁴ See J. ELY, *supra* note 2, at 77-80. The major exception lies, of course, in the area of governmental action intended to injure unpopular minorities. *Id.* at ch. 6.

⁹⁵ See T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979).

⁹⁶

As Congressman Levitas put it, "When hard decisions have to be made, we pass the buck to the agencies with vaguely worded statutes." And as Congressman Flowers added, what comes later is a virtually no-loss situation: "[T]hen we stand back and say when our constituents are aggrieved or oppressed by various rules and regulations, 'Hey, it's not me. We didn't mean

legislate our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic."⁹⁷

To redress this malfunctioning in the legislative process, Ely would revive the constitutional doctrine of *Panama Refining Co. v. Ryan*⁹⁸ and *A.L.A. Schechter Poultry Corp. v. United States*,⁹⁹ which invalidated pieces of New Deal legislation as impermissible delegations of legislative authority—"that is, for passing the decision authority on to other persons without a 'standard' or 'intelligible principle' to guide their policy choices."¹⁰⁰ The nondelegation doctrine would force legislators to do what they are elected to do; this, Ely argues in keeping with his broad theme, is judicial review reinforcing the essentials of representative democracy. I do not know if Ely was surprised when the first use made of his argument was by Justice Rehnquist in support of the contention that section 6(b)(5) of the Occupational Safety and Health Act was an invalid delegation of legislative authority.¹⁰¹ Whether he was surprised or not, Justice Rehnquist's use of the nondelegation argument both illustrates and symbolizes what is wrong with it.

First, neither Ely nor his supporting authorities¹⁰² make any convincing showing that the courts could successfully develop and apply workable standards—meaning relatively consistent, predictable and *meaningful* in terms of the constitutional policies thought to be served¹⁰³—across the incredibly broad and variant range of social, technological and economic issues which legislation in an increasingly complex society may address.¹⁰⁴ Ely's contention that a revived nondelegation doctrine need not insist "either on more [legislated] detail than [is] feasible or that matters be set-

that. We passed this well-meaning legislation, and we intended for those people out there . . . to do exactly what we meant, and they did not do it."

J. ELY, *supra* note 2, at 132.

⁹⁷ *Id.*

⁹⁸ 293 U.S. 388 (1935).

⁹⁹ 295 U.S. 495 (1935).

¹⁰⁰ J. ELY, *supra* note 2, at 132.

¹⁰¹ *Industrial Union Dep't, AFL-CIO v. American Pet. Inst.*, 448 U.S. 607, 686-87 & n.6 (1980) (Rehnquist, J., concurring). The statute provides, in pertinent part, that the Secretary of Labor "in promulgating standards dealing with toxic materials or harmful physical agents . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity . . ." (emphasis added)" *Id.* at 671 (Rehnquist, J., concurring) (quoting 29 U.S.C. § 655(b)(5) (1970)).

¹⁰² T. LOWI, *supra* note 95, at 298-300; McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127-30 (1977); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

¹⁰³ Ely does not say from which of the Constitution's "open-ended" provisions the Court would derive the nondelegation doctrine. Serious disagreement might be expected between Ely and Justice Rehnquist as to the doctrine's applicability to state legislation.

¹⁰⁴ See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3:4 (2d ed. 1978). Although Davis also advocates use of a nondelegation doctrine, it is of a very different sort and is responsive to quite different constitutional policies than those Ely has in mind. *Id.* at §§ 3:13, :15.

tled with more permanence than the subject matter . . . allow[s]"¹⁰⁵ asserts hope rather than promise, for there is no apparent reason to expect judges to have any particular expertise in making that judgment and substantial reason to believe that they would be worse than legislators at making it. Certainly it is not the accurate characterization of the "nondelegation doctrine . . . at its high point" that he says it is,¹⁰⁶ as at least one of his two case authorities, *Panama Refining*,¹⁰⁷ demonstrates. I do not think there is *any* reasonable argument that that case was rightly decided on its facts¹⁰⁸ and find it difficult to believe that Ely really considers the legislation there invalidated not to have provided, in his words, "policy direction [which] is all that [is] ever required."¹⁰⁹ It is illustrative of the point I am making, however, that Justice Rehnquist approves of and would reaffirm *Panama Refining*.¹¹⁰ There is very little reason to believe that the Court would be able to do any better job here than in the companion area of judicial control over congressional exercise of the commerce power, with whose demise—far more than that of economic substantive due process—the death of the nondelegation doctrine was associated.¹¹¹

Second, and more to the constitutional point, Ely's argument regarding the need for a revived nondelegation doctrine misapprehends the nature and sources of political accountability under our constitutional system of representative democracy. His illustration of the delegating Congressperson's defensive tactic—"Hey, it's not me. We didn't mean that"¹¹²—seems indistinguishable from that which the same Congressperson would use whenever a constituent complained of a particular judicial, executive or administrative application of a complex statute. Moreover, the likelihood that the tactic will be successful in taking the elected official off the

¹⁰⁵ J. ELY, *supra* note 2, at 133.

¹⁰⁶ *Id.*

¹⁰⁷ 293 U.S. at 388.

¹⁰⁸ *See id.* at 433-48 (Cardozo, J., dissenting); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 62-63 (1965).

¹⁰⁹ J. ELY, *supra* note 2, at 133. Whatever else can be said for or against the nondelegation part of the other decision relied on, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. at 495, it is sufficient here to observe that that case involved a large component of delegation to private parties, a feature that may invoke quite different constitutional considerations than those Ely discusses. *See* K. DAVIS, *supra* note 104, at § 3:12.

¹¹⁰ *Industrial Union Dep't, AFL-CIO v. American Pet. Inst.*, 448 U.S. 607, 674-75, 686 (1980) (Rehnquist, J., concurring).

¹¹¹ Opposing revival of the *constitutional* nondelegation doctrine does not, of course, leave the courts without any role in the area. Statutorily provided judicial review should lead to invalidation of administrative action when a court is reasonably convinced it exceeds statutory authorization and many of the same policies are often served without invalidating the legislation. *See generally id.* at 642-46. Nor in rejecting the nondelegation doctrine in its "pure" form do I mean to deny the utility of delegation-like reasoning in cases involving particular constitutional values when legislative consideration of the particular issue is unclear. *See* A. BICKEL, *THE LEAST DANGEROUS BRANCH* 151-52, 156-69 (1962); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). *But see id.* at 117-27 (Rehnquist, J., dissenting).

¹¹² *See* note 96 *supra*.

political hotseat vis-a-vis persons or groups adversely affected is about the same. With either sort of statute, a political decision *has* been made by Congress,¹¹³ it can be reversed by Congress, and there really cannot be serious doubt that aggrieved persons wanting either rectification or retribution have the same weapons at their disposal and the same knowledge about in whose direction those weapons should be pointed.

The ballot box is not the only, and in isolation is not the most important, means of political control over the Congress and its members. Our system displays innumerable ways of influencing, restraining and sanctioning the people's representative. Campaign contributions and support, lobbyists representing both so-called public and special interests of every sort and bearing a variety of inducements, newspaper editorials, political party structure and relationships (particularly at the state level), internal congressional organization and resource allocations, logrolling with fellow members of Congress—all these and more render our representatives politically influenceable and accountable. Whatever the residual deception of the average voter—by Ely's hypothesis, one who would think or care about the matter at all—as to who should be held accountable when a Congressperson votes to delegate a hard political choice rather than bite the bullet directly, the persons exercising these more precisely focused control mechanisms know exactly what is happening and why. It is quite doubtful that our representatives ultimately are held accountable at the ballot box for votes on particular statutes except insofar as these myriad other forms of political control influence the election process, or that there is any significant difference between the delegating and the bullet-biting statute in terms of the exercise or potency of these modes of control. And in the last analysis, if the public gets upset in a more generalized way (the only way the general public can) with the results of government by delegation, the 1980 elections surely demonstrated that it can make its collective voice heard.¹¹⁴

Finally, as symbolized by Justice Rehnquist's use of it, Ely's nondelegation proposal would weave an antigovernment basis into the fabric of constitutional law.¹¹⁵ Although the result—less governmental regulation—is reminiscent of economic substantive due process, the nondelegation doctrine as a judicial technique more closely resembles the renowned but equal-

¹¹³ J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 373 (1980).

¹¹⁴ I have found the sensitive and insightful commentary on American politics in G. WILLS, *CONFESSIONS OF A CONSERVATIVE* 80-116, 131-42, 170-84 (1979), useful background for reflection on these issues. In contrast, I find rather incredible the diagnosis and prescription for cure of the supposed American political malaise presented by Ely's leading authority, see T. LOWI, *supra* note 95, at 298-300.

¹¹⁵ Ely observes this in passing, noting that "liberals may not like it . . ." J. ELY, *supra* note 2, at 133-34. The question is not whether liberals like it but whether the Constitution warrants it. In my view, and that of a consistent majority of the Supreme Court since the 1930's, it does not.

ly discredited view of the equal protection clause floated by Justice Jackson in *Railway Express Agency v. New York*.¹¹⁶ Justice Jackson's analysis would, if applied, have disabled New York City from promoting aesthetics or traffic safety by forbidding trucks from carrying advertisements for hire because advocates of the legislation lacked the political strength to have the policy applied more generally to self-advertising vehicles or Times Square billboards. In a similar fashion, use of the nondelegation doctrine would often result in no governmental promotion or protection of certain social interests where some is otherwise obtainable in a pluralistic political system merely because its advocates lack the political muscle to obtain more.

Compromise is the woof and warp of politics and legislation and one of the keys to the essential stability of our representative democracy. Delegation is just one, though perhaps an increasingly important one, of the forms of compromise, where none of the contending forces can obtain all they want or avoid all they do not want. Judicial refusal of the delegation option to the legislature—and, ultimately, to the multifarious interest groups in our pluralistic political system—demands far more constitutional justification than Ely gives.¹¹⁷ While particular provisions of or structural inferences from the Constitution may warrant judicial conclusions that particular decision processes or outcomes are impermissible, that document does not erect a *single* conception of a representative democracy or impose a single method of governmental decisionmaking. Any one of a number of modes of political decision, political influence and political accountability are consistent with the Constitution's basic premises and first principles, and the advocates of the nondelegation doctrine have not convincingly shown that statutory delegation is not one of them.¹¹⁸

¹¹⁶ 336 U.S. 106, 112-16 (1949) (Jackson, J., concurring); see A. BICKEL, *supra* note 111, at 222-27.

¹¹⁷ The point is not that we cannot do better than legislate open-ended delegations of authority to administrators, or that better modes of political accountability over the actions of such administrators cannot be fashioned. The point is that there is no reason to expect the Court to be good at doing it, and that there is no adequate constitutional warrant for it to try.

¹¹⁸ I cannot resist noting my difficulty in certain other respects with Ely's apparent conception of the constitutional core of our political system. I have in mind particularly his brief but seemingly uncritical acceptance of *Buckley v. Valeo*, 424 U.S. 1 (1976), as a first amendment case involving the "suppression of communication." See J. ELY, *supra* note 2, at 233 n.27. In *Buckley*, the Court invalidated, *inter alia*, the candidate and independent expenditure limitations of the Federal Election Campaign Act; Ely's only criticism is that the first amendment standard the Court invoked was not "stringent" enough.

I have great difficulty viewing that case solely, or even primarily, in terms of the first amendment—"speech" was not suppressed, the expenditure of money for speech-related purposes was regulated on a content-neutral basis, and the expenditure of funds for purposes of promoting political ideas was not limited. In my view, the Congress of the United States made a judgment regarding the allocation of political influence over our elected officials that, on the facts presented in *Buckley*, did not transgress any constitutional premise

IV

Given Ely's basic approach to judicial review, it is also troublesome that he does not treat federalism in any systematic way. That political conception played a central role in the two most momentous occasions in the Constitution's history—its original drafting and its fundamental alteration by the post-Civil War amendments—and in one form or another is probably the major issue in the current debate over whether we shall give ourselves a third such occasion by ratifying the Equal Rights Amendment (ERA). Moreover, federalism was, as Ely acknowledges, a central pillar in Madison's pluralist theory,¹¹⁹ that theory upon which Ely in large part builds his model of judicial review.

There is, of course, something unfair about criticizing Ely, who has given us so much, for not giving us more. Nevertheless, there are dangers when a system builder such as Ely truncates his subject matter, not merely in the sense that the resultant model is more artificial and less reflective of the primary phenomena, but also in that variables formally included within the model may be misunderstood due to their intimate relationship to others excluded from consideration.

In the case at hand, it appears to me that Ely's exclusion of federalism has led him to a seriously deficient conception of the ninth amendment.¹²⁰ Rejecting the "received 'federalism'" account of that amendment which renders it meaningless as duplicative of the tenth amendment,¹²¹ Ely

underlying the system of democratic republicanism entitling the "Court as referee" to blow the whistle. See 424 U.S. at 257-66 (White, J., concurring in part & dissenting in part). There simply is no *single* conception of a representative democracy, either generally agreed upon or framed by the Constitution. In the context of the reapportionment cases, for example, (which Ely does handle effectively) see M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 218-32 (1964); A. BICKEL, *supra* note 111, at 189-97; A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 166-73 (1978). The congressional judgment in *Buckley* was, for me, no more out of line with the basic system principle than, say, a congressional decision to have members of the House of Representatives elected on an at-large basis or under a system of proportional party representation rather than under the familiar individual district system.

There were first amendment vagueness difficulties involved with the independent expenditure limitations in *Buckley*, but they seem no different in kind nor less amenable to resolution through a pattern of administrative action than those involved with governmental restraints on the political activities of public employees which a majority of the Court so willingly approved in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). See also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Now I could be wrong in this, and Ely could be right that *Buckley* is properly viewed as a first amendment case involving "suppression of communication" and, as such, was correctly decided. But what is wanting is an explanation of why this is so, an explanation that would have to derive from a more extensive and systematic theory of the constitutionally minimum core of representative democracy than Ely has provided.

¹¹⁹ J. ELY, *supra* note 2, at 80.

¹²⁰ "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

¹²¹ The "received 'federalism'" account of the ninth amendment is that expressed by Justice Black dissenting in *Griswold v. Connecticut*, 381 U.S. 479 (1965): "That Amendment was passed, . . . as every student of history knows, to assure the people that the Constitution

argues that both the language and the history (what little there is) of the ninth amendment indicate the "existence of federal constitutional rights beyond those specifically enumerated in the Constitution. . . ." ¹²² As with other open-textured constitutional provisions, Ely seeks a "principled approach to judicial enforcement . . . that is not hopelessly inconsistent with our nation's commitment to representative democracy. . . ." ¹²³ In application, Ely uses the ninth amendment to justify the result in *Bolling v. Sharpe*, ¹²⁴ finding it the only responsible basis for application of an equal protection concept against the federal government. Although the point is not further developed, Ely presumably would apply his representation-reinforcing view of the equal protection clause ¹²⁵ full force against the federal government through the ninth amendment for he concludes: "[I]n terms of respect for the judgments of federal courts and the success of enforcement efforts it seems important that the states not be bound by a set of textually unstated constitutional rights that do not restrain the actions of the federal government." ¹²⁶ What Ely does not discuss is the possibility that the federal government might be bound by a set of textually unstated constitutional rights that do not, as a matter of federal law, restrain the actions of state governments.

A central premise of Ely's approach to judicial review is that judicially enforceable constitutional rights derive from the political community—specifically, from the community's constitution which sets the parameters of "ordinary" political decisions by declaring certain substantive outcomes and certain modes of decisionmaking out of bounds. Judicially enforceable rights specifically do not derive from some other and ulterior source such as natural law, a view Ely attributes directly to the framers of the ninth amendment. ¹²⁷ But under that view, the apparent sources of those rights the framers referred to in the ninth amendment are the states—those political communities (also democratic republics, it is worth noting) that the Constitution recognizes in addition to the national political community it creates. ¹²⁸

The facially apparent import of the ninth amendment is to indicate that

in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication." *Id.* at 520 (Black, J., dissenting).

¹²² J. ELY, *supra* note 2, at 38.

¹²³ *Id.* at 41.

¹²⁴ 347 U.S. 497 (1954) (invalidating racial segregation in the District of Columbia schools). The Warren Court used the due process clause of the fifth amendment as the textual peg for applying the equal protection reasoning of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), against the federal government, a conclusion Ely rejects in line with his argument that the due process clauses of the fifth and fourteenth amendments require only that the government use fair procedures when acting to inflict serious harm upon specific individuals. J. ELY, *supra* note 2, at 14-21, 32-33.

¹²⁵ J. ELY, *supra* note 2, at 135-79.

¹²⁶ *Id.* at 38.

¹²⁷ *Id.* at 39.

¹²⁸ See generally *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 400 n.3 (1971) (Harlan, J., concurring).

as against the federal government, "the people" may "retain" constitutional rights in addition to those specifically enumerated in the Constitution and that the way the people retain constitutional rights is by forbidding governmental actions abridging them. This suggests that if the people of the states retain rights as against their state governments, such rights are also safeguarded under the ninth amendment from abridgment by the exercise of those powers delegated to the federal government.¹²⁹

Ely's only reference to this possibility is his observation "that state law, even state constitutional law, is incompetent [to control the actions of the federal government] and must therefore content itself with controlling the actions of the state governments."¹³⁰ But valid as that proposition is as a general matter—that is, federal law is supreme over state law under article VI—the most obvious reading of the ninth amendment is that the framers reversed it in regard to "rights retained by the people," both foreseeing and providing that the people of the states could create rights as against those governments which should not be abridged by the federal government. This conception of the ninth amendment is consistent with the federalism concerns which are known to have motivated its adoption, does not render it duplicative of the tenth amendment, and offers an objective and textually indicated source of constitutional values not enumerated in the document itself. Moreover, this view of the ninth amendment could be consistent with Ely's "representation-reinforcing" approach to judicial review, at least if he were to integrate a federalism dimension within it.

To illustrate, suppose that the proposed ERA fails of ratification by a sufficient number of states. It is difficult to predict what the consequent

¹²⁹ I find this conception of the ninth amendment consistent with the amendment's history as detailed in Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 2-9 (1980), although Berger would doubtless disagree. I in turn find far from persuasive Berger's conclusion that the ninth amendment merely confirms that "the people reserved to themselves power to add or subtract from the rights enumerated in the Constitution by the process of Amendment exclusively confided to them by Article V." *Id.* at 14. Among other things, Article V, unlike the ninth amendment, makes no reference at all to "the people."

¹³⁰ J. ELY, *supra* note 2, at 37. Ely does discuss the possibility that the Ninth Amendment was intended to indicate not that there were other federal constitutional rights, but rather that the enumeration of certain rights in the first eight amendments was not to be taken to deny or disparage the existence of *other sorts of rights*—rights that do not rise to the constitutional, at least not to the federal constitutional level. That is, it might have been intended to make clear that despite the Bill of Rights Congress could create further rights, . . . or that a state could do so in its own constitution. *Id.* at 36-37. He rejects the view that the ninth amendment grants the federal government power to create additional rights since its federalism context makes clear that the ninth as well as the tenth amendment restrict the powers of the federal government. In the alternative, he argues that it is "silly" to read the ninth amendment as "rebut[ting] the inference that the Bill of Rights, controlling only federal action, had somehow preempted the efforts of the people of the various states" to create new rights enforceable against their state governments. J. ELY, *supra* note 2, at 37.

impact will be upon the Supreme Court's application of the fourteenth amendment's equal protection clause to gender classifications, but it might be that failure to adopt the ERA would subsequently give the Court pause before rejecting out of hand as illegitimate the justification that a recently enacted Utah or Alabama statute embodying a gender classification promotes "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and . . . seek[s] [as its] objective the reinforcement of that model among the State's citizens."¹³¹ In the event the Court felt compelled to acknowledge the legitimacy of such a state purpose, it nevertheless should not, given the ninth amendment, concede the legitimacy of such a governmental purpose when analyzing gender classifications in federal statutes. After all, thirty-five states did ratify the ERA. A number of the ratifying states have ERA-counterpart provisions in their state constitutions and others have reached the same judgment through state court interpretations of state constitutions. In that circumstance, the impermissibility of laws premised on gender-based role allocations should be deemed a "right . . . retained by the people" in a sufficient number of states as to render invalid disparagement or denial of the right by the federal government.

Viewing the ninth amendment as textually commanding protection against federal abridgment of individual rights first created and protected by the states could be "representation-reinforcing" in the following senses (although these are not the only possibilities). Even if it is unlikely that Congress with its members elected from the states would, for example, now enact gender-based legislation,¹³² new statutes are not the only and, in a time of rapid social change, are perhaps not the primary source of federal law violative of rights originating at the state level of the federal system. Rather, most of the existing body of federal law was formulated at an earlier and quite different time and the ordinary inertia always attending the legislative process could delay indefinitely repeal of existing gender-based statutes. Furthermore, a legislative minority in the Congress always has substantial ability to block new legislation.¹³³ Social change is often controversial and, for example, a highly motivated congressional minority drawn from states rejecting the ERA and a policy of gender

¹³¹ *Orr v. Orr*, 440 U.S. 268, 279 (1979).

¹³² Assessment of the realistic possibility of this occurring is complicated by a number of factors, not the least of which is the political temper of a given moment. Transitory political majorities at the state no less than the national level may reject the philosophy underlying a constitutionally enshrined value. That is why we write rights into constitutions in the first place. Also potentially troublesome is the way we select our federal congress. Each state, regardless of population size, gets two Senators. Members of the House, however, are allocated among the States on the basis of population, are elected by districts, and the majority sentiment in any one of which may or may not correspond to that of the state as a whole.

¹³³ J. ELY, *supra* note 2, at 67; J. CHOPER, *supra* note 104, at 27. See generally *id.* at 12-45.

neutrality might well be able to block efforts to repeal gender distinctions in existing federal statutes. On a similar view of social change in the states and the legislative process in Congress, it might be that other older federal laws—sexual orientation classifications, for example—could in the not too distant future become candidates for serious scrutiny under a federalism-promoting view of the ninth amendment.¹³⁴

V

The immediately preceding discussion prompts my final observation on *Democracy and Distrust*. As powerful and, in broad outline, persuasive as the book is, it is not so comprehensive as its subtitle: "A Theory of Judicial Review." Alexander Bickel is a central character in Ely's book, one whom Ely describes as "probably the most creative constitutional theorist of the past twenty years,"¹³⁵ and it is Bickel's more than any other "fundamental value" approach to constitutional law to which Ely responds and which Ely would replace with his unique version of process methodology. To lay colorable claim of superior title to Bickel's homestead, however—to offer what is truly a theory of judicial review—Ely will have to broaden his sights to encompass more of the ground over which Bickel labored so long and so well. I am not certain whether that requires a theory of constitutional government.¹³⁶ I am certain that it requires extensive and integrated treatment of those three old companions in arms—justiciability, separation of powers and federalism—and, thereby, a more extensive elaboration of both the justification for and the limits of judicial review than Ely has attempted thus far. If he gets around to writing that one, book review or not, I am sure I will read it more than once.

¹³⁴ See, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979). This view of the ninth amendment raises, of course, a host of subsidiary issues that need to be addressed. How many states need recognize and protect a "right" before the federal government is forbidden from denying or disparaging it? Is a majority of states necessary? sufficient? Does the population size of particular states matter? What form of state recognition and protection is required? Must, for example, the "right" be recognized at the constitutional level in all states that "count"?

Such difficulties notwithstanding, federalism concerns are known to have motivated the framing of the ninth amendment, J. ELY, *supra* note 2, at 34-36, and the conception of that amendment suggested above is consistent with the core political values of federalism—diversity and pluralism. It is frequently argued that those values are threatened or undermined when federal standards of constitutional right are applied against states affording less protection; but they are no less threatened or undermined when federal law acts to undercut individual rights in states that recognize and protect them. This seems particularly apparent in the gender discrimination area, for example, where federal law reinforcing sex-based role modeling, as in the social welfare and benefit programs, could seriously undermine efforts by the people of particular states to progress to a gender-neutral society.

¹³⁵ J. ELY, *supra* note 2, at 71.

¹³⁶ See Tribe, *supra* note 27, at 1079-80.